

**BOARD OF APPEALS CASE NO. 4875**

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**BEFORE THE**

**APPLICANTS: Paul & Vernita Dietz**

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**ZONING HEARING EXAMINER**

**REQUEST: Variance to construct a dwelling 40 feet high in the Agricultural District; 1310 Grafton Shop Road, Forest Hill**

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**OF HARFORD COUNTY**

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**Hearing Advertised**

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**Aegis: 12/9/98 & 12/16/98**

**HEARING DATE: February 3, 1999**

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**Record: 12/11/98 & 12/18/98**

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### **ZONING HEARING EXAMINER'S DECISION**

The Applicants, Paul and Vernita Deitz, appeared before the Hearing Examiner requesting a variance from Section 267-34(C), Table II, of the Harford County Code, to allow the construction of a residential dwelling in the Agricultural District with a height of 40 feet.

The subject property is located in the Solomon's Choice subdivision and is further known as Lot 7, 1310 Grafton Shop Road, in the Third Election District. The parcel is identified as Parcel 2, in Grid 1-C, on Tax Map 48. The parcel contains 5.3 acres, all of which is zoned agricultural.

Mr. Paul Deitz testified that he has requested a variance to construct a dwelling with a maximum height of 40 feet. Mr. Deitz testified that the property in question is unusually shaped and has a unique topography. He also testified that the property is surrounded by an extensive, mature stand of trees.

Mr. Deitz testified that he intends to construct a 5,300 square foot residence which is a reduction from the original plan. Approximately 40 feet of the roofline would be above the 35 foot limitation imposed by the Zoning Code. The proposed home meets all other development requirements of the Harford County Code.

## **Case No. 4875 - Paul and Vernita Dietz**

The setbacks, septic reserve area and topography of the property limit the area of the lot in which the house can be sited to the proposed location. In addition, there were architectural considerations to the present height of the house. Mr. Deitz testified that, in order to maintain the square footage of the house and to comply with the 35 foot height limitation, he would have to create a larger footprint which would result in increased imperviousness and additional grading on-site.

The proposed location of the residence is a substantial distance and would not be visible from most adjoining properties. Mr. Deitz testified that the topography of the land and the existing tree cover would effectively screen the house from surrounding residences. He also proposed to construct a berm and plant additional landscaping to screen in areas which do not have mature tree cover.

Mr. Deitz testified that he will suffer practical difficulty if the proposed variance is denied as he would not be allowed to construct the home which he has planned and maintain its architectural integrity. Furthermore, Mr. Deitz may be required to complete additional grading and increase the imperviousness of the site.

Mr. Deitz does not believe that the proposed variance would have any adverse impact on surrounding properties or would block the light or air to adjoining properties. He also did not believe that the proposed use would have an adverse environmental impact.

Kevin Geraghty, a principal in Solomon's Choice Farm, LLC, testified in support of the requested variance. Mr. Geraghty explained that Solomon's Choice Farm, LLC is the developer of the Solomon's Choice subdivision. Solomon's Choice Farm, LLC is charged with the responsibility of approving all development and architectural plans for residences constructed within the development pursuant to a Declaration of Covenants, Conditions and Restrictions recorded in the Land Records of Harford County at Liber 2746, Folio 0088. Mr. Geraghty has reviewed the plans of the applicants in this case and has approved said plans.

Mr. Geraghty also testified that he resides in the Solomon's Choice subdivision in a home which is currently the closest home to the subject lot. He did not believe that the proposed variance would have any adverse effect on surrounding properties or on the common areas of the Solomon's Choice subdivision.

## **Case No. 4875 - Paul and Vernita Dietz**

Kevin McBride, Chief of the landscape architecture department of Morris and Ritchie Associates testified as an expert landscape architect and an expert in site plan design. He offered two site plans which he had prepared as Applicant's Exhibit 18 to show the site lines from the proposed house to surrounding properties. Mr. McBride's conclusion was that surrounding properties, with the exception of the Geraghty residence, would not be able to see the proposed house.

Mr. McBride further testified that height requirements generally are imposed because of fire protection concerns, as well as to provide a uniformity of design and to protect the light, air and view of surrounding properties. Mr. McBride testified that fire services in Harford County have adequate equipment and capability to respond to a fire in a 40-foot building. He further testified that the requested variance would not have any impact on light, air or view of adjoining properties.

Mr. McBride confirmed that the subject property is unique because of its size, shape, topography, distance from adjoining homes and substantial screening. He also confirmed that the Applicant would suffer practical difficulty if the requested variance is denied as they would be required to perform additional grading and increase the impervious surface and runoff on the property. Furthermore, Mr. McBride believes the reduction of the roof height would result in a negative architectural impact. Mr. McBride did not believe the variance would adversely affect surrounding properties.

David Miller, secretary of the Harford Land Trust, testified in opposition to the requested variance. Mr. Miller testified that the Harford Land Trust is the beneficiary of a perpetual conservation easement on the Solomon's Choice property. Mr. Miller testified that he believed the requested variance was not in keeping with the intent of the conservation easement or the grantor of the easement. Mr. Miller testified that he does not live in Solomon's Choice or in close proximity to Solomon's Choice.

The Staff Report of the Department of Planning and Zoning recommends approval of the original variance request of 48 feet.

## **Case No. 4875 - Paul and Vernita Dietz**

### **CONCLUSION:**

The Harford County Zoning Code, pursuant to Section 267-11, authorizes the granting of variances provided the Board finds that (1) by reason of the uniqueness of the property or topographical conditions literal enforcement of Part 1 will result in practical difficulty or unreasonable hardship; and (2) the variance will not be substantially detrimental to adjacent properties and will not materially impair the purposes of this Part 1 or the public interest.

The concept of uniqueness in variance cases was discussed by the Court of Special Appeals in the case of North v. St. Mary's County, 99 Md. App. 502, 638 A.2d 1175 (1994) wherein the court stated:

In the zoning context the "unique" aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon neighboring property. "Uniqueness" of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigatable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to such characteristics as unusual architectural aspects and bearing or party walls.

An example of uniqueness is found in the use variance case of Frankel v. Mayor and City Council, 223 Md. 97, 104 (1960), where the court noted: "He met the burden; the irregularity of the ... lot ... that it was located on a corner of an arterial highway and another street, that it is bounded on two sides ... by parking lots and public ... institutions, that immediately to its south are the row houses ..."

The Court of Appeals of Maryland in McLean v. Soley, 270 Md. 208, 310 A.2d 783 (1973) held that the following criteria are to be used for determining whether "practical difficulty" has been established:

1. Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.

## **Case No. 4875 - Paul and Vernita Dietz**

- 2. Whether a grant of the variance applied for would do substantial justice to the applicant as well as other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.**
- 3. Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.**

**Generally, an applicant must prove undue hardship in order to obtain a use variance; practical difficulty does not warrant the granting of a use variance. However, an area variance may be granted where the Applicant demonstrates practical difficulty or undue hardship or both.**

**The uncontradicted testimony offered by Applicant and its witnesses is that the subject property is unique by virtue of its size, shape, topography and screening.**

**Applicant's witnesses were also clear in their conclusion that the Applicant would suffer practical difficulty if the requested variance were denied. Applicant would not be able to construct the house of his choice as the architectural considerations involved would preclude the chosen design. Furthermore, Applicant may be required to do more grading on the site and increase the impervious surface of the lot.**

**There was also no evidence offered that the proposed use would adversely effect any surrounding properties. It should be noted that the Applicant has reduced the size of the requested variance from 13 feet to 5 feet. The Site Plans offered by Kevin McBride as Applicant's Exhibit 18 clearly demonstrate that the only residence which will be able to see the subject house is the Geraghty residence. Mr. Geraghty testified that he had no objection to the proposed height variance. Kevin McBride further testified that the general purpose of height requirements is for fire protection as well as to protect light, air and view of surrounding properties. Mr. McBride confirmed that there is adequate fire service available for a building of this size and that the requested variance would not impact on the light, air or view of adjoining properties. It should also be noted that only approximately 40 feet of the entire roofline will be at the 40 foot height level. The remaining area of the roof will be below that height with a significant portion below the 35 foot limitation.**

**The Staff Report prepared by the Department of Planning & Zoning confirms that the**

## **Case No. 4875 - Paul and Vernita Dietz**

**Applicant does meet the requirements for the originally requested variance of thirteen feet.**

**The Protestant in this matter objected to the proposed use based on his argument that the use violated the restrictive covenants for the Solomon's Choice Farm subdivision. The enforcement of restrictive covenants is not a function of the Zoning Hearing Examiner nor the Board of Appeals. This issue was discussed in Perry v. County Board of Appeals from Montgomery County, 211 Md. 297, 127 A.2d 507 (1956). In Perry, the Applicants sought a special exception approval for operation of a care home on property zoned for residential use. Surrounding neighbors in the community opposed the proposed use based, in part, on their contention that the use violated the restrictive covenants of the community. The Court of Appeals held that "a zoning ordinance does not override or defeat whatever private rights exist and are legally enforceable, but neither is it controlled in its workings or effects by such rights. The enforcement of restrictive covenants is a matter for the exercise of the discretion of an equity court in the light of attending circumstances." Perry v. Board of Appeals, 127 A.2d at 507. The Court went on to cite 2 Rathkopf, The Law of Zoning and Planning, page 387, "The validity of the zoning ordinance, the grant of a variance or 'exception' should be considered independently of its effect upon covenants and restrictions in deeds." It also cited favorable Chayt v. Maryland Jockey Club, 179 Md. 390, 18 A.2d 856, "Such private restrictions controlled by contract and real estate law are entirely independent of zoning and have no proper place in proceedings of this character, notwithstanding if in a proper proceeding the restrictions contended are or shown to be binding upon the properties mentioned, zoning cannot nullify them." The decision of the Court of Appeals in Perry has been cited favorably in numerous later appellate decisions in Maryland. As a result, the Hearing Examiner should not consider any testimony regarding the alleged violation of the restrictive covenants.**

**Case No. 4875 - Paul and Vernita Dietz**

Therefore, it is the recommendation of the Hearing Examiner that the requested variance to allow the height of the dwelling to be increased to 40 feet, subject to the condition that the Applicants obtain all necessary permits and approvals for construction of the dwelling.

Date            FEBRUARY 24, 1999

L. A. Hinderhofer  
Zoning Hearing Examiner